2013 IL App (2d) 120485-U
No. 2-12-0485
Order filed November 12, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NINA M. CUNNINGHAM, f/k/a Nina M. Wiggins,	)	Appeal from the Circuit Court of De Kalb County.
Petitioner-Appellant,	)	
v.	)	No. 07-F-22
JOHN W. PARKER,	)	Honorable Ronald G. Matekaitis,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in vacating its order striking respondent's original petition to modify child support (and in thereby allowing respondent four additional months of retroactive relief), as it did so only after hearing evidence that the child-support order, which had been entered in respondent's absence, was not based on respondent's actual income; (2) the court did not abuse its discretion in reducing respondent's support obligation: respondent's evidence did not violate a discovery order, and the court's award constituted a substantial amount of his very low income.

¶ 2 Petitioner, Nina M. Cunningham, f/k/a Nina M. Wiggins, appeals a judgment granting the petition of respondent, John M. Parker, to modify his child-support obligation under the Illinois

Parentage Act of 1984 (Parentage Act) (750 ILCS 45/1 *et seq.* (West 2010)). Petitioner challenges the judgment on both procedural and substantive grounds. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties have a son, who was born July 5, 1999. On March 5, 2007, the trial court ordered respondent to pay petitioner $50 per week child support, based on a finding that his net income was $250 per week. On January 31, 2011, the court (1) found that respondent's net income was $1,534.46 per week and that he was $11,494.43 in arrears; and (2) increased his support obligation to $306.84 per week, effective immediately. Respondent, who lived in Rochester, New York, did not appear at any of the proceedings that led to either order.

¶ 5 On March 30, 2011, respondent petitioned to modify child support. He alleged that, since January 31, 2011, his income had been substantially less than $1,534.46 per week. On April 14, 2011, the trial court, by an agreed order, (1) established respondent's arrearage at $8,000; (2) required him to pay $1,000 of the arrearage that day and the remaining $7,000 by July 15, 2011; (3) set a hearing on his petition to modify for July 21, 2011; and (4) required each party to tender written discovery by April 29, 2011, and to respond by May 20, 2011.

¶ 6 On June 8, 2011, petitioner moved "to compel compliance with discovery." On June 13, 2011, the trial court ordered respondent to tender discovery by June 20, 2011. On July 14, 2011, respondent moved to continue the hearing on his petition to modify child support. His motion stated that he had mistakenly believed that the hearing was set for July 15, 2011; that he had to be in Rochester on July 21, 2011; and that he had expected to close a real-estate deal that would have enabled him to pay the arrearage, but the transaction had been delayed until early August. On July

18, 2011, the court denied respondent's motion to continue and set July 21, 2011, for a hearing on petitioner's motion to compel discovery and respondent's petition to modify child support.

¶ 7 On July 21, 2011, respondent having failed to appear, the trial court struck respondent's petition to modify child support. The court also found respondent in contempt, based on the unpaid arrearage of $8,000, and continued the cause to August 22, 2011, for "payment of purge."

¶ 8 On July 26, 2011, respondent's attorney, Jack Slingerland, filed a new petition to modify child support, along with a "notice of motion" and an affidavit of service by mail on petitioner's counsel, stating that he would present the petition in court on August 22, 2011. The petition was substantively identical to the one that the court had stricken. Also on July 26, 2011, Slingerland filed a motion to reconsider the order striking the original petition to modify child support. The motion was accompanied by an affidavit of service by mail on petitioner's counsel, stating that Slingerland would present the motion on August 22, 2011. On August 22, 2011, on petitioner's motion, the court entered an order for body attachment, requiring that respondent appear personally in court by November 10, 2011, "to answer to the charge of contempt" for failing to obey its prior orders.

¶ 9 On November 10, 2011, after a hearing at which Slingerland appeared but respondent did not, the trial court granted petitioner's motion to compel discovery, barring respondent "from testifying related to [*sic*] documents and issues never tendered in discovery." The court ordered respondent to appear by December 20, 2011, and continued respondent's petition to modify child support until that date. On December 20, 2011, the court continued the petition to February 27, 2012, and reissued the order of body attachment. On February 27, 2012, the court continued the cause to March 27, 2012, and, on that date, it continued the cause to May 1, 2012. On April 27, 2012, respondent filed an amended motion for an agreed order to credit him with $2,000 against his arrearage.

¶ 10 On May 1, 2012, the trial court held a hearing. The record contains no transcript of the hearing, but petitioner has included one in the appendix to her brief. Although the general rule is that an attachment to a brief may not be used to supplement the record on appeal, this may be done when the parties stipulate that the attachment is authentic. *People v. Stewart*, 343 Ill. App. 3d 963, 975 (2003). As respondent agrees that the transcript is authentic, we summarize its contents.

¶ 11 At the outset of the hearing, petitioner moved to discharge her attorney and represent herself. The court granted the motion. Slingerland stated that he was presenting the amended motion for an agreed order and the petition to modify child support. He explained that, on July 21, 2011, the court struck the original petition but that it had yet to rule on respondent's motion to vacate that order. Petitioner stated, without elaboration, "I haven't received a motion to vacate." She did not assert that she was unaware that the motion would be heard that day, and she did not request that the court strike or continue the motion to vacate. The judge noted that, if the court vacated the order striking the original petition, it could modify child support retroactively to March 30, 2011, when the original petition was filed; otherwise, the modification could go back only as far as July 26, 2011. He agreed that the court had never ruled on the motion to vacate. He did not do it at that time.

¶ 12 The cause proceeded to an evidentiary hearing on respondent's petition. Respondent testified on direct examination as follows. He was an ordained minister and, since November 5, 2006, had been the pastor of Christ Healing Temple Church (CHTC) in Rochester. His wife was a nurse, and they rented a home. He received no salary from CHTC but only a free-will offering, consisting of cash that congregants donated at each weekly service. His secretary, EveLiz Pagan, took the cash, along with an offering for the support of the church, and made sure that respondent received the former. CHTC had no paid employees; Pagan and a maintenance man volunteered.

¶ 13 Slingerland asked respondent to identify a one-page table entitled "Free Will Offering for Rev. John Parker." Petitioner objected that the exhibit had not been disclosed in discovery and was barred by the November 10, 2011, order. Slingerland explained that the exhibit was a record of free-will offerings that respondent had received since January 1, 2012, after the discovery process had been completed, and that it merely summarized matters to which respondent would testify. The court overruled petitioner's objection and admitted the exhibit. Respondent then testified that the exhibit, prepared by Pagan, showed how much had been "dropped in the free-will offering" for him between January 1, 2012, and April 29, 2012. These amounts were similar to what he had received since he began as pastor at CHTC. Although the January 2011 support order had been based on the assumption that his salary was then approximately $75,000, he had never been paid so much.

¶ 14 Respondent testified on cross-examination as follows. After moving to Rochester, he briefly sought employment outside CHTC, but he had not done so since the original child-support order of March 5, 2007. As of May 1, 2012, he was "not allowed to work medically."

¶ 15 Respondent called Pagan. Petitioner objected, based on the discovery order. The judge overruled the objection. Pagan testified consistently with respondent about the free-will offering that went to respondent. She added that nobody received a paycheck from CHTC and that CHTC filed no tax returns. In addition to the free-will offering that supported respondent, CHTC took another offering to pay the church's expenses. CHTC's registered membership fluctuated, but it was usually about 30 to 35 people.

¶ 16 Petitioner presented no evidence. On questioning by the judge, respondent testified as follows. In December 2010, he spoke by phone with an employee of the "Illinois Department of Health Care and Family Services." He told her that he was a minister but that he was not employed.

He did not provide her any income information and did not disclose that he was receiving the free-will offering, which, at the time, was about $140 to $170 per week. On further questioning by the parties, respondent added that, when the caller asked whether he "actually got paid," he told her that he received only an "offering." During the call, neither he nor the caller referred to a figure of "60 to $70,000" in income.

¶ 17 In his closing argument, respondent contended that the court should exercise its discretion to modify his child-support obligation retroactively to March 30, 2011. He noted that, in the proceedings that resulted in the judgment of January 31, 2011, he had not been represented by counsel, but that he obtained counsel shortly after the judgment and moved to continue the cause, although the court denied the motion. On the merits of the petition, respondent contended that the existing obligation of $306 per week was not supported by any evidence and that even $50 per week, which he was requesting, might exceed the statutory guidelines.

¶ 18 In response, petitioner argued that, although respondent had been ordered to pay child support as early as March 5, 2007, he actually paid none until more than four years later. On the merits, petitioner contended that respondent had presented scant evidence of his current or recent income. She did not argue that he had intentionally forgone opportunities to earn more or that he had taken a low-paying job for improper motives.

¶ 19 The trial judge stated as follows. Nothing substantiated the income figure on which the January 2011 support order was based. The evidence proved that respondent's net income had been far lower, especially as CHTC was "a pretty bare-bones operation" that received minimal income itself. The evidence was "[more] consistent with a $50 a week child support setting than it [was]

with the original amount." There had been a substantial change in circumstances, as respondent was not earning "anywhere near" the amount that was the basis of the existing support order.

¶ 20 The trial court entered two orders. In the first, an agreed order, petitioner acknowledged that respondent had paid her $2,000 against his child-support arrearage. The second order found that respondent's net income was substantially different from that on which the January 31, 2011, award had been based. The order reduced respondent's obligation to $50 per week, effective March 30, 2011, and required him to pay $10 per week toward his arrearage. Petitioner timely appealed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, petitioner argues first that the trial court erred both in hearing and in granting respondent's motion to vacate the July 21, 2011, order that struck respondent's original petition to modify child support. Petitioner asserts in part that the court erred in hearing the motion, because the accompanying "Notice of Motion" stated only that the motion would be presented on August 22, 2011, and respondent never "re-noticed" it for presentation on May 1, 2012. We agree with respondent that petitioner has forfeited this argument. At the hearing of May 1, 2012, petitioner never objected to respondent's failure to "re-notice" the motion for that day. She did state tersely that she had not received the motion (although it had been filed long ago), but that was not sufficient to raise the alleged failure of notice. See *Williamsburg Village Owners' Ass'n v. Lauder Associates*, 200 Ill. App. 3d 474, 479 (1990). Because the sufficiency of notice is forfeited if not timely raised (*id.*), petitioner has forfeited her argument.

¶ 23 Moreover, even disregarding forfeiture, we would reject petitioner's contention. Petitioner would have the burden to prove that she suffered prejudice from the lack of notice. See *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 983-84 (2008). Respondent's motion to vacate the order striking his original petition to modify was filed on July 26, 2011, and petitioner,

through her attorney, was thenceforth aware of the relief that respondent was seeking. The cause was continued on August 22, 2011, and several times thereafter, without the resolution of respondent's motion to vacate, putting petitioner on notice that the motion to vacate was still before the trial court. Petitioner does not explain why respondent's failure to give her explicit notice that he would present the motion to vacate at the May 1, 2012, hearing caused her any prejudice. We see none.

¶ 24 Petitioner challenges the trial court's decision on a second procedural basis. She contends that the trial court erred in vacating the order striking respondent's original petition to modify child support, because the court did not hear any evidence on which to base its decision. We see no merit in petitioner's contention. The decision to grant respondent's motion and vacate the order striking the original petition was within the trial court's discretion, and we may not disturb its ruling absent an abuse of that discretion. See *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001).

¶ 25 We agree with respondent that the trial court did not abuse its discretion in vacating the order striking respondent's original petition to modify child support. The effect of the court's action was to enable respondent to obtain relief retroactive to March 30, 2011, instead of July 26, 2011, against the January 31, 2011, support order. We note that the court did so only after the evidentiary hearing; all the evidence at the hearing was that respondent's income had never remotely approximated the figure on which the January 31, 2011, order had been based and that the order had been entered when respondent was residing in New York and did not have counsel. We cannot say that reinstating the original petition to modify child support was arbitrary or unreasonable. See *id.* Therefore, we reject petitioner's challenge to the vacatur of the order striking respondent's original modification petition.

¶ 26 We turn to petitioner's second set of arguments on appeal, which address the propriety of the grant of respondent's petition to modify child support. Petitioner raises two challenges to the

judgment: (1) she contends that the trial court erred in admitting certain evidence; and (2) she asserts that the trial court erred in ultimately reducing respondent's obligation. We disagree on both issues.

¶ 27 Respondent contends first that the trial court erred in admitting (a) respondent's exhibit listing the free-will offerings that he received between January 1, 2012, and April 29, 2012, because it lacked a foundation and was barred by the November 10, 2011, discovery order; and (b) Pagan's testimony, because that was also barred by the discovery order. Petitioner also appears to argue that Pagan's testimony was inadmissible because the trial court had violated Illinois Rule of Evidence 615 (eff. Jan. 1, 2011) by failing to exclude her from the courtroom while respondent testified.

¶ 28 Petitioner has forfeited most of her challenges. At trial, she objected to the admission of the exhibit and Pagan's testimony only on the ground of the discovery order. She did not assert that the exhibit lacked a proper foundation or that it was inadmissible hearsay. Further, petitioner neither moved to exclude witnesses nor objected to Pagan's testimony on the ground that it violated the rules of evidence. An objection to evidence on a specified ground forfeits all grounds not specified. *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). Therefore, the foregoing objections are forfeited.

¶ 29 Petitioner did object to both the exhibit and Pagan's testimony as violations of the November 10, 2011, discovery order. However, the record refutes petitioner's assertion that respondent violated the discovery order. The order barred respondent from "testifying related to [*sic*] documents and issues never tendered in discovery." The order did not bar the exhibit, which concerned matters that not only postdated the order, but, according to Slingerland's uncontradicted representation, postdated the entire discovery process and merely summarized matters to which respondent would (and did) testify himself. Also, the order did not restrict Pagan's testimony at all. Petitioner's evidentiary arguments are without merit.

¶ 30 Finally, we address petitioner's more general attack on the judgment. She contends that the trial court abused its discretion in reducing respondent's support obligation from $306.84 per week to $50 per week. Under the Parentage Act, the trial court had the discretion to modify the obligation, based on a substantial change in circumstances, and we shall not disturb its decision absent an abuse of that discretion. See 745 ILCS 45/16 (West 2010); *In re Marriage of Bussey*, 108 Ill. 2d 286, 296 (1985). We cannot say that the trial court abused its discretion. As the judge noted, there was no evidence that, since March 30, 2011, respondent's weekly net income had been anywhere near the $1,534.46 figure on which the previous support order had been based. The only evidence was that respondent relied for his remuneration on a free-will offering of approximately $140 to $170 per week from the members of what the judge described as a "pretty bare-bones operation" that could not afford regular salaries for anyone. Thus, the modification, which required respondent to pay as child support a substantial amount of his anticipated remuneration, was no abuse of discretion.

¶ 31 Petitioner argues that the modification was improper because respondent's low income resulted from his intentional underemployment so as to avoid having to pay more child support. At the trial court level, petitioner at most hinted obliquely at this argument. She did not raise it in her closing argument. An appellant may not secure a reversal based on a theory not raised in the trial court. *Haudrich v. Howmedica*, *Inc.*, 169 Ill. 2d 525, 536 (1996). Therefore, we do not consider petitioner's intentional-underemployment argument.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 34 Affirmed.